BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF WASHINGTON

In the Matter of THE APPLICATION REGARDING THE CONVERSION AND ACQUISITION OF CONTROL OF PREMERA BLUE CROSS AND ITS AFFILIATES	No. G02-45 SPECIAL MASTER'S ORDER ON OIC STAFF'S MOTION FOR PROTECTIVE ORDER

This matter comes before me on the OIC Staff's "Motion for Protective Order," dated February 20, 2004. I have considered the Motion, Premera's Response, dated March 15, 2004, and the OIC Staff's Reply, dated March 19, 2004.

The OIC Staff requests the entry of a Protective Order for certain documents responsive to Premera's Request for Production dated October 31, 2003. The OIC Staff asserts that such documents, identified on the OIC Privilege Log, are protected from discovery as confidential attorney work product and/or attorney-client communications (are "privileged").

Premera responds that 1) many of the documents were exchanged between The OIC Staff and their designated experts and are therefore not privileged; 2) many of the documents (and/or related materials) have already been produced by the OIC Staff in discovery; 3) some of the documents are within the scope of a prior Special Master's ruling requiring disclosure; and 4) the OIC Staff waived any arguable claims of privilege months ago.

The OIC Staff replies that communications between Special Assistant Attorney General John Ellis and/or Assistant Attorney General Robert Fallis and OIC's consultants are protected because such communications concerned issues related to Mr. Ellis and Mr. Fallis' own

privileged legal work, not to the experts' reports. The OIC Staff further replies that it made all reasonable efforts to protect the documents at issue and did not waive privilege.

Privilege—Testifying experts. Documents exchanged by and other communications between the OIC Staff and its testifying experts generally are discoverable. Neither Civil Rule 26(b)(4) nor Civil Rule 26(b)(5) (which relate to trial preparation materials and experts) protects information acquired, prepared, or developed by an expert expected to be called at trial by the party who retained the expert. *Harris v. Drake*, 116 Wn.App. 261, 270-71 (2003). Though no Washington case appears to be directly in point, I believe the Washington appellate courts would agree that any "documents and information disclosed to a testifying expert in connection with his testimony are discoverable by the opposing party, whether or not the expert relies on the documents and information in preparing his report." *In re Pioneer Hi-Bred Int'l Inc.,* 238 F.3d 1370, 1375 (Fed. Cir. 2001). See also, *Gall ex rel. Gall v. Jamison*, 44 P.3d 233, 240 (Colo. 2002)("a communication is discoverable even if the expert did not rely on it in forming her opinion."); *TV03, Inc. v. Royal Insurance Co., 193 F.RE.D. 490* (S.D.Miss. 2000)(an "expert's 'marching orders' can be discovered").

The OIC Staff does not contest the applicable legal standard, but asserts that it seeks a protective order for documents that contain confidential and privileged communications between Mr. Ellis and/or Mr. Fallis and the OIC Staff's consultants regarding Mr. Ellis and Mr. Fallis' own legal agenda, which was distinct from that of the OIC Staff and was unrelated to the experts' reports. The OIC Staff asserts that Mr. Ellis and Mr. Fallis' communications, between attorney and consulting expert, are protected by Civil Rule 26(b)(5)(B) from discovery (and from inquiry at the hearing itself). See *Crenna v. Ford Motor Co*., 112 Wn. App. 824, 828 (1975).

I have previously ruled on related issues. 1) The "Special Master's Order on OIC Staff's Motion for Protective Order," dated November 24, 2003, ruled that a January 16, 2003 email from Mr. Fallis to Andrew Taktajian (of testifying experts Cantilo & Bennett) was privileged

because "Mr. Fallis' communication was not that of counsel with testifying expert, but of counsel with a consultant necessary to represent the interests of the client" (the Attorney General in her special statutory responsibility under RCW 24.03.220-.230 to consider Premera's plan for post-conversion distribution of assets). 2) By contrast, my oral ruling of December 2, 2003 required disclosure where I found that Mr. Fallis had conferred with Cantilo & Bennett regarding the subjects of Cantilo & Bennett's expert report and testimony, not only in connection with Mr. Fallis' representation of the Attorney General in service of her special statutory responsibility. My ruling permitted questioning concerning subjects related to Cantilo & Bennett's testimony, but not questioning related to attorney-expert consultation concerning only the Attorney General's statutory responsibility.

The use of testifying experts as consultants and the breadth of many of the exchanges with such experts make the following rulings difficult. The rulings nevertheless attempt to distinguish between those documents in category 1) and those in category 2), as well as to protect documents apparently not provided to any expert. (Further discussion is included in the rulings as to individual documents.)

Waiver. The OIC Staff and Premera generally agree that the applicable legal standard for considering claims of waiver of privilege is set out in *United States v. Bagley, 204 F.R.D. 170* (C.D. Cal. 2001). *Bagley* at 179, FN12, describes as "most elegant" the five-factor totality of the circumstances analysis of claims of waiver following inadvertent document production that was set out in *Hydraflow, Inc. v. Enidine, Inc*., 145 F.R.D. 626, 637 (W.D.N.Y. 1993). I believe that the Washington appellate courts would apply this, or a closely similar, analysis:
(1) The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production, (2) the number of inadvertent disclosures, (3) the extent of the disclosures, (4) the promptness of measures taken to rectify the disclosures, and (5) whether the overriding interest of justice would be served by relieving the party of its error.

1. *Reasonableness of precautions.* OIC Staff represents: OIC Staff received Premera's First Set of Requests for Production on October 31, 2003. Premera requested that OIC Staff produce at least 86 categories of documents, encompassing all documents maintained by the OIC Staff and by its consultants and the employees of such consultants. More than 80,000 documents were encompassed by Premera's requests.

The Special Master ordered production of all documents pertaining to consultants who were being deposed two days prior to their depositions, which ran from November 17 through December 4, 2003. The OIC Staff produced over 55,000 documents between November 1 and December 1, 2003, including over 14,000 electronic files (many of which were nested zipped files containing a mix of email, reports, spreadsheets and memos). The magnitude of the task and the shortness of the time permitted for its performance made in-depth document review impossible. Working with a team, OIC Staff was able in many cases to review only the subject line of an email or other document to understand its gist before determining whether to produce it.

Considering the massive scope of production required on a radically compressed schedule, I believe that the OIC Staff took reasonable precautions to prevent inadvertent document disclosure. For OIC Staff to have carefully reviewed each document within the scope of Premera's Requests to Produce would probably have caused it to be unable to meet the ordered two-day pre-deposition deadline for production of documents, which had been requested by Premera itself.

2. *Number of inadvertent disclosures.* Though Premera provides examples of a number of documents listed on the Privilege Log that the OIC Staff has produced, neither Premera nor the OIC Staff has attempted to determine how many of such documents have in fact been produced. The OIC Staff's total inadvertent disclosures have not

been demonstrated to have approached twenty (though it is certainly possible that the actual number is greater).

3. *Extent of disclosures.* Considering the tens of thousands of documents produced by the OIC Staff, the percentage of produced documents which appear on the Privilege Log appears to be near-trivial.

4. *Promptness of measures taken to rectify disclosures.* The OIC Staff represents that it was unaware that it had inadvertently produced protected documents until Premera provided its Response to the OIC Staff's Motion for a Protective Order. By letter dated December 29, 2003, the OIC Staff provided further redactions to certain documents it had sent to Premera on December 16, 2003, and requested that Premera "replace and return, or shred and confirm, the original set."

   Under the circumstances, I believe the OIC Staff acted reasonably promptly to rectify its errors.

5. *Interest of justice.* Considering the extensive disclosures required by the present order and the lack of prejudice to Premera in withholding production of the documents as to which the OIC Staff's privilege claims are sustained by this order, I believe that the interest of justice is served by denying Premera's waiver claim.

For all of these reasons, I do not find that the OIC Staff has waived the privilege by inadvertent disclosure.

The following annotated Privilege Log identifies the Source, Bates Numbers, Date, Author, Recipient, Subject Matter, Privilege Asserted, and Ruling for each document at issue. Where the rulings column indicates "Sustained," I have sustained the OIC Staff's claim of privilege. Where the Rulings column indicates "Overruled," I have overruled the OIC Staff's claim of privilege. Documents as to which the Rulings column indicates "Overruled" shall be made available to Premera and the Interveners within five court days of the date of this Order.

Dated this 1st day of April, 2004

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George Finkle
Superior Court Judge, Retired
Special Master